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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. [redacted] 38

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND LAIRD BELL, EXECUTORS OF THE ESTATE OF WILLIAM H. REDINGTON, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WALTER T. FISHER,
Counsel for Petitioners.

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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioners, praying for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit affirming an order of the United States Board of Tax Appeals, respectfully submit:

This case arises under the estate tax provisions of the Revenue Act of 1921. It involves the taxability as part of the decedent's gross estate, of certain property which

had been held by the decedent and his wife as joint tenants since before the passage of the first estate tax act, and which, upon the decedent's death, passed to his wife by right of survivorship.

On or about October 5, 1909, the decedent conveyed, through an intermediary, to himself and his wife, as joint tenants, certain real estate in Evanston, Illinois. Title to the property vested, upon delivery of the deed, in the decedent and his wife as joint tenants with right of survivorship. The decedent died on October 8, 1923, at which time the Revenue Act of 1921 was in force. The real estate was valued by the respondent at $90,000 and was included by him in the decedent's gross estate as subject to tax. (R. 13.) On appeal to the Board of Tax Appeals, the Board held that one-half the value of the property should be included in the gross estate, and redetermined the tax accordingly. (R. 16, 23 B. T. A. 635.) The Circuit Court of Appeals affirmed the Board's decision. (R. 31, 62 F. (2d) 591.)

The Revenue Act of 1921, unlike the later acts, contains no clause specifically making the section which relates to joint tenancies retroactive. The issue here is whether the act should be applied retrospectively so as to reach joint tenancies created prior to its enactment (and prior to the passage of the first estate tax act containing similar provisions). The constitutionality of the statute—if as a matter of construction it applies to the property in question—is not disputed.

Reasons for Allowance of the Writ.

The decision of the Circuit Court of Appeals in this case is in conflict with the following decisions of other Circuit Courts of Appeals on the same question:

Lynch v. *Congdon,* (C. C. A. 8th) 1 F. (2d) 133.

Carter v. *English*, (C. C. A. 9th) 15 F. (2d) 6.
Hernandez v. *Becker*, (C. C. A. 10th) 54 F. (2d) 542.

It is also in conflict with the reasoning in *Walker* v. *Grogan*, (E. D. Mich.) 283 Fed. 530 (affirmed (C. C. A. 6th) 300 Fed. 1004).

The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court. *Shwab* v. *Doyle*, 258 U. S. 529 and *Knox* v. *McElligott*, 258 U. S. 546 hold that Sections 202 (b) and (c) of the Revenue Act of 1916 do not apply to transfers made and joint tenancies created prior to the passage of that Act. Section 402 (d) of the 1921 Act is, for present purposes, exactly the same as Section 202 (c) of the 1916 Act. The lower court held that previously created joint tenancies are taxable under the 1921 Act. It did this by misapplying *Tyler* v. *United States*, 281 U. S. 497, and other cases on constitutionality which cases have no bearing on the issue in the present case.

The question involved is important. A similar question cannot arise under the 1924 and later acts, because those acts contain retroactive provisions; but many cases are still pending under the old acts. Since the decision in the present case, the following cases involving the same question have been decided:

Whitehead v. *Commissioner* (C. C. A. 8th), ... F. (2d) ..... (decided March 20, 1933).

Kaufman v. *Reinecke* (N. D. Ill.), ... F. Supp. ..... (decided January 17, 1933; reported in 333 C. C. H. at par. 9162).

Safety Deposit & Trust Company v. *Tait* (D. Md.), ... F. Supp. ..... (decided March 27, 1933; reported in 333 C. C. H. at 9242).

Stephenson v. *Commissioner*, 27 B. T. A. .....

(decided February 28, 1933; reported in 337 C. C. H., Dec. 7133).

The decision of the Circuit Court of Appeals for the Eighth Circuit in *Whitehead* v. *Commissioner, supra* is contrary to the decision of the same court in *Lynch* v. *Congdon,* 1 F. (2d) 133. We are informed that a petition for rehearing is about to be filed in the *Whitehead* case.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that said final orders of the said Circuit Court of Appeals be reversed or altered by this Honorable Court; and they also pray for such other, further, or different relief as may seem proper.

And your petitioners will ever pray, etc.

HAROLD T. GRISWOLD, W. W. S. CARPENTER, and LAIRD BELL, *Executors of the Estate of William H. Redington, Deceased,*
Petitioners.

By WALTER T. FISHER,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals filed June 9, 1931, is reported in 23 B. T. A. 635, and is also found at Record, page 15. The opinion of the Circuit Court of Appeals for the Seventh Circuit filed November 26, 1932, is reported in 62 F. (2d) 591 and is also found at Record, page 31.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Seventh Circuit on November 26, 1932. (R. 38.) A petition for rehearing was denied on January 28, 1933. (R. 39.) A writ of certiorari is asked under Section 240 of the Judicial Code (Act of Mar. 3, 1911, c. 231, § 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, § 1, 43 Stat. 938).

Statement of the Case and of the Question Presented.

For a statement of the case and of the question presented see this petition, p. 1.

Specification of Errors.

The Circuit Court of Appeals for the Seventh Circuit erred in deciding that any part of the value of the joint property in question, which property passed at the decedent's death to his wife by right of survivorship, is taxable as a part of the decedent's gross estate under Section 402 (d) of the Revenue Act of 1921.

ARGUMENT.

We believe that the decision of the court below must be reversed on the authority of *Knox* v. *McElligott*, 258 U. S. 546, and *Shwab* v. *Doyle*, 258 U. S. 529.

The decedent died while the Revenue Act of 1921 was in force. The pertinent section of that act is as follows:

> "[The gross estate shall include property]—
>
> "(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: * * *"

The statute thus taxes the interest in property "held jointly or as tenants in the entirety by the decedent and any other person". Does this mean property held jointly, etc., since before the act was passed; or does it apply only to estates thereafter created? This question was decided in *Knox* v. *McElligott*, 258 U. S. 546, which arose under the corresponding section of the 1916 Act. In that case a New York decedent owned securities which, in 1912, he transferred (through an intermediary) to himself and his wife as joint tenants. He died in 1917. The executrix included in her return and voluntarily paid tax with respect to one-half of the property. The Commissioner included the other half as well and required her to pay an additional tax which she sued to recover back. It was held, on the authority of *Shwab* v. *Doyle*, 258 U. S. 529, that the provision in question does not apply to joint estates created before the enactment of the statute, and that the plaintiff should recover.

Shwab v. *Doyle*, 258 U. S. 529, and its companion cases (*Union Trust Co.* v. *Wardell*, 258 U. S. 537; and *Levy* v. *Wardell*, 258 U. S. 542), hold that Section 202 (b) of the 1916 Act (providing for the inclusion of property which was the subject of a transfer made in contemplation of, or intended to take effect in possession or enjoyment at or after death) is not retrospective and does not apply to transfers made before its enactment. *Knox* v. *McElligott*, 258 U. S. 546, is a similar holding that Section 202 (c) of the 1916 Act (referring to joint tenancies) is not retroactive.

In the 1918 and 1921 Acts, the sections relating to transfers were changed. In each case the clause was added, "whether such transfer or trust is made or created before or after the passage of this Act." So the *Shwab, Union Trust* and *Levy* cases are not in point under the 1918 and later Acts with respect to transfers in contemplation of, or intended to take effect, etc., at death.

But there were no such changes in 1918 and 1921 with respect to joint tenancies. Section 202 (c) of the 1916 Act which was held in *Knox* v. *McElligott* not to be retroactive, is, for present purposes, exactly the same as Section 402 (d) of the 1921 Act. It was not until the 1924 Act (Chap. 234, 43 Stat. 253, effective June 2, 1924) that a clause was added (Sec. 302 (h)) making the section covering joint tenancies retroactive.

It is true that the actual result in *Knox* v. *McElligott* was the inclusion of one-half the joint property. But that was because the taxpayer paid the tax on one-half voluntarily and sued to recover back the tax only with respect to the second half. The only issue before the court was with respect to the second half; and that half was excluded on the ground that the section of the statute referring to joint tenancies does not apply to tenancies previously created.

The statute taxes property "to the extent of the interest therein held jointly," etc. The "interest held jointly" means, of course, the entire value of the property. This meaning is clear from the following clause which excludes such part "as may be shown to have originally belonged to such other person," etc. So where all of the property originally belonged to the decedent, the statute either taxes the entire value or no part of it; and the decision in *Knox* v. *McElligott* that the statute does not reach estates created before its passage is necessarily a decision that no part of such estates is subject to the tax. In other words, as a result of the decision in *Knox* v. *McElligott*, Sections 202 (c) of the 1916 Act and 402 (d) of the 1921 Act must be construed as if they read,

> [The gross estate shall include property]—
> "to the extent of the interest therein held jointly or as tenants in the entirety *under an estate or tenancy created after the passage of this Act.*"

In no other way can the distinction between the 1921 Act and the 1924 Act with respect to joint tenancies be observed. The Revenue Act of 1924 was the first statute which made the joint tenancy provision retroactive. Section 302 (h) of the 1924 Act says,

> "Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates . . . whether made, created, arising, existing, exercised, or relinquished *before or after the enactment of this Act.*" (Italics ours.)

This provision was introduced after the decisions in *Shwab* v. *Doyle*, 258 U. S. 528, and *Knox* v. *McElligott*, 258 U. S. 546. There is no such provision in the earlier acts (as respects joint tenancies) and the cases just cited hold that no such provision can be read into those acts.

Had the taxpayer in *Knox* v. *McElligott* contended that no part of the jointly owned property is taxable, on the reasoning of that case, the contention would have

been upheld. The case has always been so understood by all the lower federal courts. See *Lynch* v. *Congdon,* (C. C. A. 8th) 1 F. (2d) 133; *Carter* v. *English,* (C. C. A. 9th) 15 F. (2d) 6; *Hernandez* v. *Becker,* (C. C. A. 10th) 54 F. (2d) 542. (The decision in the present case is the first departure from this view by any court.) The Commissioner of Internal Revenue recognized this when, in 1926, he amended the regulations under the 1921 Act by adding to Article 23 (which provides for the inclusion of property held jointly) the following sentence:

> "This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death."

On July 3, 1930, the Commissioner reversed his position and amended Article 23 of the regulations further, by striking out the sentence above quoted. (T. D. 4293). This latter amendment came just a few weeks after the decision in *Tyler* v. *United States,* 281 U. S. 497, and was apparently made on the theory that that case overruled *Knox* v. *McElligott.* The decision of the Circuit Court of Appeals in the present case is based upon the same theory.

But *Tyler* v. *United States* did not overrule *Knox* v. *McElligott. Knox* v. *McElligott* was a decision on construction. *Tyler* v. *United States* was one on constitutionality. The *Tyler* case merely holds that the provisions of the 1916 and 1921 acts, which include in the gross estate property held by the decedent and his wife as tenants by the entirety, are not unconstitutional. All of the estates in question in that case were created after the effective date of the applicable statute and there was no question of construction. This court, after reciting the facts in the *Tyler* case, says:

> "The applicable provision of § 202(c) is explicit, and the intent of Congress thereby to impose the

challenged tax is not open to doubt. The sole question is in respect of its constitutional validity." (p. 501.)

The same thing can be said with respect to the other cases relied on by the court below; also with respect to the more recent case of *Gwinn* v. *Commissioner,* 287 U. S. ..... (Dec. 5, 1932). All of these cases are cases on constitutionality and do not touch the question of construction which was decided in *Shwab* v. *Doyle* and *Knox* v. *McElligott.*

Contrary to the impression to be gained from a reading of the opinion of the court below, we have never disputed the constitutionality of the tax in question. We have never said that the subsequently enacted statute could not reach the jointly owned property in this case. Our contention is, and has always been, that the statute does not, as a matter of proper construction, reach this property. We have relied entirely on *Shwab* v. *Doyle* and *Knox* v. *McElligott.* The authority of these cases has never been questioned in any later decision of this court, and we believe that they are controlling of the issue in the present case.

Respectfully submitted,

WALTER T. FISHER,
Counsel for Petitioners.